

THE CRIMINAL JURY IN OUR TIME

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Lorena Bobbit. The Menendez Brothers. And before them, Rodney King, Reginald Denny, Larry Davis, John Hinckley, Dan White And after them, O.J. Simpson.

This series of recent notorious acquittals and hung juries—consisting mostly of defendants' names, but sometimes victims' names and even place names ("Crown Heights")—seems to be a chronicle of horrible crimes and system failures. The litany of names conjures up not merely specific criminal jury trials, but some of the deepest divisions and fault lines in contemporary America. At the center of the debate about the meaning of these cases lies an ancient, but always evolving institution: The jury.

In truth, the recent series of notorious acquittals and hung juries cannot be laid solely at the feet of the juries in these cases. Of critical significance in each case were the subjective standards of the substantive criminal law in this country² and the indulgent evidentiary rulings that

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² In my view, the greatest legal significance of the notorious cases listed above is what they reveal about the transformation of American criminal law in recent decades. Over the last quarter century or more, American criminal law—the substantive standards we enunciate to define which behaviors are prohibited—has shown a marked movement toward more subjective standards in the definitions of crime. This transformation can be traced back at least to the American Law Institute's promulgation of its Model Penal Code in 1962. Rather than invoke the objective "reasonable man" or "reasonable person" test, modern codes either explicitly require or have been interpreted increasingly to require a subjective test: Whether the action at issue was reasonable for a person like the defendant, in light of her life experiences. See Holly Maguigan, *Battered Women and Self Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. Pa. L. Rev. 379, 409-11 (1991) (discussing the reasonableness standard and subjectivity). In recent years, even as legislatures have shown increasing discomfort with this trend, courts have continued to display a tendency to apply subjective, and hence mitigating, standards of behavior. See, e.g., *In re Christian S.*, 872 P.2d 574 (Cal. 1994) (en banc) (holding that the judicially constructed doctrine of "imperfect self-defense" still applies in California, even though in the early 1980s the settled doctrine of "diminished capacity" had been elimi-

inevitably result under such standards.³ Still, criticism of the criminal jury is too widespread simply to dismiss out of hand. There is in the land a palpable ambivalence—scholarly and judicial—about juries, as well as popular distrust of the jury's competence or integrity or both.⁴ Few are the voices that commend the jury as a deliberative institution, an opportunity for citizen participation, or an effective check on unfounded persecution. For most, these ideas seem to be simply worn and outdated clichés. Dissatisfaction with the criminal jury can be fueled, of course, by disagreement with the verdict (or the absence of a verdict) in specific cases, but the criticism goes far beyond these particular concerns. The jury is often discussed as if it were an incomprehensible and unwieldy vestige of a previous era, a relic of a less worthy past. Already, scholarly

nated by popular referendum and subsequent legislation). This growing subjectivity is not limited to the issue of self-defense. It is prevalent also in deciding what constitutes provocation to reduce murder to manslaughter. See B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense by Battered Women*, 1991 *Duke J. Comp. & Intl. L.* 169. In judging what constitutes duress, see *id.* at 180, and in determining the definitions of criminal recklessness and negligence, see *Farmer v. Brennan*, 128 L. Ed. 2d 811, 827 (1994).

³ As legal standards become more subjective and defendant-specific, we can expect increasing efforts to permit testimony and arguments tangential to the immediate facts of the crime. Thus, for instance, the testimony in the *Menendez* cases about alleged paternal abuse should not be blamed on outrageous lawyering, ignorant jurors, or rampant victimology—at least not directly. The immediate reason this evidence dominated the proceedings was altogether simple: California appellate courts have been at the forefront of individualizing and subjectifying criminal law standards, with the result that any factor arguably impinging on a defendant's mindset at the time of the crime becomes logically relevant. See generally Phillip E. Johnson, *Book Review*, 50 *U. Chi. L. Rev.* 1534 (1983) (discussing the process of subjectifying criminal law standards through the application of the insanity plea). In turn, trial judges may be reluctant to exercise their concededly broad discretion to limit marginally admissible, cumulative, or speculative evidence and arguments. This is a pervasive phenomenon in criminal trials, even in more ordinary ones without significant media coverage, and it may well be a consequence of the asymmetry in the right to appeal in criminal cases—the judge cannot be reversed on evidentiary issues that he decided in favor of the defense. See generally Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 *U. Chi. L. Rev.* 1 (1990) (discussing the results of the defendant's exclusive right to appeal in criminal cases).

⁴ For recently-published commentaries informed in part by the *Menendez* and *Hinckley* cases, mentioned above, see Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* (1994); George P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (1995). Other interesting commentaries that draw on some of these cases include Stephen J. Adler, *The Jury: Trial and Error in the American Courtroom* (1994); Alan M. Dershowitz, *The Abuse Excuse and Other Cop-Outs, Sob Stories, and Evasions of Responsibility* (1994).

commentators writing in the wake of the notorious cases invoked above have proposed fundamental “reforms” of our criminal jury trials.⁵

In this essay, I consider the present discomfort with the jury in the context of our larger legal discourse. There is much about the jury (civil as well as criminal, though I am here concerned only with the latter) that does not fit comfortably into our modern constitutional and political culture. Many preeminent constitutional values of the founding period—*private liberty*, *federalism*, and *local control*—were well served by a requirement of jury verdicts in criminal trials. Over the past two hundred years, these values have been challenged, if not eclipsed, by competing values. Some essential characteristics of the jury—or, at least, characteristics that until recently we have believed essential to the jury—are difficult to reconcile with certain of the social and political values that characterize the latter half of the twentieth century.

But we should be cautious in altering further the roles and powers of the jury. We are fortunate that the “anachronism” of the jury, if this it be, was so explicitly written into our Constitution that there is virtually no likelihood that our present unhappiness will translate into abolition of this institution.

At the time of the framing of our Constitution, the jury in criminal cases was important enough to be twice guaranteed. One provision that safeguards the right to jury trial is, of course, the Sixth Amendment, which states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”⁶ But even before the Bill of Rights was adopted, the original Constitution contained its own guarantee of jury trials, though limited to federal prosecutions. Ar-

⁵ Abramson, *supra* note 4, at 9-12 (supporting the institution of the criminal jury, but recommending several important alterations such as elimination of peremptory challenges and explicit recognition of the jury’s right to nullify the law); Adler, *supra* note 4, at xv (arguing that civil and criminal juries will not survive if they perform as poorly as shown in the author’s research); see also Akhil R. Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169 (1995) (presenting ten suggested reforms that will preserve the intended function of the jury as an institution); John H. Langbein, *Money Talks, Clients Walk*, *Newsweek*, Apr. 17, 1995, at 32, 33 (noting advantages of European criminal justice systems that do not utilize lay juries).

⁶ U.S. Const. amend. VI.

ticle III provides that “[t]he trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.”⁷ State constitutions also guaranteed jury trials.⁸

In America, the jury was an expression of the commitment to democracy and to the ultimate sovereignty of “the People.” Blackstone’s admonition was widely accepted: If the determination of criminal cases were left to the professional judiciary alone, the judges, “in spite of their own natural integrity, [would] have frequently an involuntary bias toward those of their own rank and dignity.”⁹ Moreover, the Sixth Amendment requirement that juries be not only of the *state*, but also of the *district* in which the crime occurred reflects, in part, the insistence of the anti-Federalists that juries be *local*. Only with such a guarantee could the community protect its own members against abuse by a distant officialdom.¹⁰ It was recognized in the early years of the Republic that juries had the right to nullify—that is, to ignore the law given by judges and to acquit against the weight of the evidence.¹¹ These features of the jury guaranteed that “the People” retained control over the ultimate outcome of criminal cases.

But times have changed. The values that have become ascendant in the modern era, in constitutional decisionmaking as well as the larger legal culture, are *rationality*, *equality*, and *freedom of expression*. Our legal system seems to value reason and complexity over intuition and emotion, diversity and representation over judgments of individual impartiality or special competence, and access and openness over confidentiality and secrecy.

⁷ U.S. Const. art. III, § 2, cl. 3.

⁸ See Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 22.1(a) (2d ed. 1992); Amar, *supra* note 5, at 1169.

⁹ 3 William Blackstone, Commentaries 379 (Univ. of Chicago 1979) (1768).

¹⁰ See Daniel W. Van Ness, Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases, 28 J. Marshall L. Rev. 1, 28-29 (1994).

¹¹ Partial histories of the jury in nineteenth and twentieth century America are found in Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867 (1994); Harold M. Hyman & Catherine M. Tarrant, Aspects of American Trial Jury History, in *The Jury System in America: A Critical Overview* 23 (Rita J. Simon ed., 1975).

While these three values may sometimes be in tension—in issues regarding the jury as well as other matters—they combine synergistically to condemn the exercise of unreviewable discretion, for which our era has little sympathy. Witness the evolution of the military draft from a system of local draft boards to a national lottery.¹² Witness the development of entitlement programs as the preferred mode of government spending.¹³ Witness the growth and complexity of administrative law, centering as it does on the review of discretionary actions.¹⁴ Witness, most recently, the enactment of mandatory sentences and the federal sentencing guidelines,¹⁵ which are an open rejection of the discretionary authority of federal trial judges. The increasing reliance in many jurisdictions on inflexible sentencing rules, alongside continued proposals for prosecutorial guidelines,¹⁶ evidences a commitment to equality, an abhorrence of disparity, and a demand for accountability in criminal cases. These themes of the modern age are difficult to reconcile with the essentially non-rationalistic and discretionary institution of the jury.¹⁷

Traditionally, a significant amount of discretionary authority has been located not only in the jury itself, but in those who choose members of the jury. Until recently, counsel had virtually unlimited discretion—without standards, reasons, or review—to exercise a given number of peremptory strikes of persons from the jury venire. In the last decade, however, the Supreme Court has increasingly rejected this tradition. Under *Batson v. Kentucky*¹⁸ and its progeny, the Fourteenth Amendment's

¹² See Akhil R. Amar, Note, Choosing Representatives by Lottery Voting, 93 Yale L.J. 1283, 1289 n.37 (1984).

¹³ See generally Kate Stith, Congress' Power of the Purse, 97 Yale L.J. 1343 (1988) (arguing that congressional creation of open-ended spending authority is an abdication of Congress' power of the purse).

¹⁴ See Jerry L. Mashaw et al., *Administrative Law: The American Public Law System*, Cases and Materials 140-151 (3d ed. 1992) (discussing growth in administrative sector and concomitant growth in legislative and judicial regulation thereof).

¹⁵ See Kate Stith & Steve Y. Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 Wake Forest L. Rev. 223 (1993).

¹⁶ See James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521 (1981).

¹⁷ See, e.g., Guido Calabresi & Philip Bobbitt, Tragic Choices 57-64 (1978) (referring to the jury as the prototypical "aresponsible" decisionmaking agency).

¹⁸ 476 U.S. 79 (1986).

equal protection guarantee limits the bases on which peremptory challenges may be made. As Justices Thurgood Marshall,¹⁹ Antonin Scalia,²⁰ Sandra Day O'Connor,²¹ and Clarence Thomas²² each have separately recognized, the future of peremptory challenges is uncertain. Several commentators have called for sharp curtailment or outright abolition of the practice.²³ Nor is the *Batson* assault on peremptories the first effort to alter the process of jury selection to reduce the role of discretionary judgment. Previous constitutional decisions and statutory reforms had abolished special qualifications and the "key man" system for jury participation²⁴ and had established jury venire selection procedures designed to better reflect a "cross-section of the community."²⁵

Like these earlier reforms, the *Batson* line of cases (particularly *Georgia v. McCollum*,²⁶ the 1992 Supreme Court decision that applying the *Batson* prohibition to defense peremptory challenges) values equality more than impartiality and fair trials as these concepts were historically understood. Underlying many of these alterations in jury structure is the notion that a fair and impartial jury is achieved not simply by seeking individuals who are unbiased and otherwise well-qualified, but by ensuring that there is a representative diversity in the jury room and thus a balance of juror perspectives and biases.²⁷ Yet the Sixth Amendment does not have a "cross-section-of-the-community" requirement. It *does*, on the

¹⁹ See *id.* at 107 (Marshall, J., concurring) (advocating the elimination of peremptory challenges in criminal cases).

²⁰ See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1439 (1994) (Scalia, J., dissenting).

²¹ See *id.* at 1432 (O'Connor, J., concurring).

²² See *Georgia v. McCollum*, 112 S. Ct. 2348, 2359-61 (1992) (Thomas, J., concurring).

²³ See, e.g., Abramson, *supra* note 4; Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153 (1989); Amar, *supra* note 5, at 1182-83.

²⁴ For instance, the Federal Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1869 (1989), prohibits the use of the key-man system in the selection of grand juries and petit juries.

²⁵ See *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

²⁶ 112 S. Ct. 2348 (1992).

²⁷ See generally Abramson, *supra* note 4, at 10-12 (arguing that heterogeneity in selected juries enhances democratic deliberation by those juries).

other hand, have an "impartiality" requirement.²⁸ At the time the Constitution was written, jury service was not a universal right, and a system of peremptory challenges by each side was thought to be a suitable means to eliminate the individuals most likely to be biased for one side or another.²⁹ In the modern jury selection cases, we can see how the Fourteenth Amendment's guarantee of equal protection trumps (or at least redefines) the more ancient guarantees of the Sixth Amendment.

The jury's deliberative processes and powers have likewise undergone significant changes since the Republic was founded. As demands for uniformity, rationality, and accountability in our legal processes have become more pronounced, the scope of jury discretion—in judging both the law and the facts—has been contracting.

At the time of the framing of the Constitution, nullification—whereby a jury refuses to convict despite sufficient evidence of the crime—was a right and maybe even an obligation of the jury.³⁰ Over the course of the next century, this aspect of the jury's role shrank considerably as courts increasingly distinguished between issues of law and issues of fact and sought greater certainty in the application of law.³¹ At the end of the nineteenth century, the Supreme Court declared that federal juries have no right to decide the law: "[I]t is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. . . . [Were it otherwise], our government [would] cease to be a government of laws, and become a government of men."³²

²⁸ U.S. Const. amend. VI.

²⁹ See *Holland v. Illinois*, 493 U.S. 474, 481 (1990) (construing the Act of Apr. 30, 1790, ch. 9, § 30, which reflected the tradition of peremptory challenges in our criminal justice system, and *United States v. Marchant*, 25 U.S. (12 Wheat.) 480, 483-84 (1827), which recognized peremptory challenges as part of the common law of the United States); *Swain v. Alabama*, 380 U.S. 202, 214-17 (1965).

³⁰ See generally Mark D. Howe, *Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582 (1939) (highlighting the original role of juries as vehicles for democracy through interpretation of both law and fact); Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 Law & Contemp. Probs. 51 (1980) (reviewing historical basis and modern application of jury nullification).

³¹ See generally Drew L. Kershen, *Vicinage*, 30 Okla. L. Rev. 1, 77-84 (1977) (discussing fading importance of vicinage and the evolution of the modern jury).

³² *Sparf v. United States*, 156 U.S. 51, 102-03 (1895).

Of course, criminal juries continue to have the effective *power* to go beyond fact-finding and to refuse to apply the law in a particular case. As long as courts cannot direct a verdict of guilty, jury nullification will be possible. (It is likely that the juries in several of the notorious acquittals listed at the beginning of this essay effectively exercised the power of nullification, though the subjective nature of the legal standards at issue³³ may have confounded the distinction between law-giving and law-applying.) Increasingly, however, the modern age has recognized that the jury has the raw *power* to nullify, but not the *right*, and certainly not the *obligation*, to do so.³⁴ Thus, very few courts inform jurors of their power to nullify.³⁵ Moreover, the weight of recent precedent has supported instructing the jury that it “must” convict if it finds proof of all elements beyond a reasonable doubt.³⁶

There are three practices that undergird the jury’s equitable power of nullification and that have ensured the jury’s centrality and autonomy in criminal trials. Each of these practices is peculiar, or almost so, to criminal cases, and each is increasingly under attack. First is the practice in criminal cases of asking only for a general verdict, that is, a verdict of “guilty” or “not guilty,” rather than detailed fact-finding by the jury. As Judge Jon O. Newman has pointed out, the criminal law has generally avoided jury interrogatories because in the typical case these “may propel a jury toward a logical conclusion of guilt.”³⁷ But in recent years—as criminal codes and criminal indictments have become more complex—special verdicts and complex verdict forms have been used in a growing

³³ See *supra* note 2.

³⁴ See generally M. Kristine Creagan, Note, Jury Nullification: Assessing Recent Legislative Developments, 43 Case W. Res. L. Rev. 1101 (1993) (noting and criticizing several states’ efforts to introduce jury nullification legislation).

³⁵ See, e.g., *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

³⁶ See *State v. Ragland*, 519 A.2d 1361 (N.J. 1986) (including review of federal and state decisions upholding instructions that require juries to convict when government meets its evidentiary burden).

³⁷ *United States v. Ruggiero*, 726 F.2d 913, 927 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part), (“[T]he jury, as the conscience of the community, must be permitted to look at more than logic.”) (citing, *inter alia*, *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969), cert. denied, 469 U.S. 831 (1984)).

number of cases, particularly in federal cases.³⁸ The perceptible discomfort with the general verdict is born of a desire for logic, precision, and reason.

A second distinctive practice in criminal cases that protects the jury's traditional prerogatives is the prohibition on appeals by the government, which guarantees finality to a jury verdict of acquittal. But in recent years, this prohibition, too, has broken down at the margins. As recently as fifteen years ago, many thought it would violate the Constitution's Double Jeopardy Clause to permit the government to appeal a criminal sentence.³⁹ Now such appeals are routine.⁴⁰ Furthermore, it is conceivable that the Supreme Court will reinterpret the prohibition on double jeopardy in order to permit prosecutorial appeals where there is an acquittal,⁴¹ as Justice Holmes urged in dissent long ago.⁴²

A third practice in almost all jurisdictions in the United States has been to insist that criminal verdicts be unanimous. This rule protects the power of the minority on the jury, a minority that empirical research suggests is usually disposed toward acquittal.⁴³ Nearly twenty-five years ago, however, the Supreme Court opened the door to non-unanimous criminal verdicts under the Constitution.⁴⁴ As yet, no additional states (beyond Louisiana and Oregon, which have long permitted non-unanimous verdicts) have moved in this direction. In the last year, how-

³⁸ See, e.g., *Bseirani v. Mahshie*, 881 F. Supp. 778 (N.D.N.Y. 1995); *Lopez v. United States*, 857 F. Supp. 1000 (D.P.R. 1994), *aff'd sub nom. Torres-Lopez v. United States*, 47 F.3d 1156 (1st Cir. 1995); *United States v. Bertoli*, 854 F. Supp. 975 (D.N.J. 1994).

³⁹ See 4 ABA Standards for Criminal Justice 20-1.1, 20-3.1 (2d ed. 1980); Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001 (1980).

⁴⁰ The decision permitting prosecutorial appeals of the legality of a sentence is *United States v. DiFrancesco*, 449 U.S. 117 (1980).

⁴¹ See Office of Legal Policy, U.S. Dep't of Justice, Report to the Attorney General on Double Jeopardy and Government Appeals of Acquittals i, 64 (1987) (recommending that the Department seek an appropriate case to argue that the government should be entitled to appeal a bench trial acquittal, on grounds of legal error, when correction of the error would allow for a guilty verdict without requiring a new trial).

⁴² See *Kepner v. United States*, 195 U.S. 100, 135-36 (1904) (Holmes, J., dissenting).

⁴³ See Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 460 (1966).

⁴⁴ *Apodaca v. Oregon*, 406 U.S. 404 (1972).

ever, the idea of non-unanimous verdicts has again been put on the table by commentators and scholars,⁴⁵ no doubt in part a reaction to deadlocked juries in several recent high-profile cases. There should be no surprise here. As fundamental as unanimity appears to have been to our traditional understanding of criminal juries,⁴⁶ it is at best an anomaly in the modern age—a secret and silent veto power, given to one person, that need not be explained or justified.

In addition to the jury's power to acquit (or to "hang") against the evidence, its control over fact-finding also appears to be diminishing. Historically, juries have enjoyed significant, unreviewable discretion in making credibility determinations and in drawing inferences from the evidence.⁴⁷ The same practices that give the jury discretion to nullify have reinforced its preeminence as fact-finder. These include the use of the general verdict, the non-appealability of acquittals, and, of particular significance, the low threshold of evidentiary sufficiency that appellate and habeas courts have historically applied when reviewing convictions. It was not until the last quarter-century that the Supreme Court declared the "reasonable doubt" standard to be part of due process⁴⁸ and the appropriate standard for reviewing courts to judge the sufficiency of the evidence.⁴⁹ In an important lecture that questioned our historic reliance on jury fact-finding, Judge Newman took federal courts to task for shirking their duty to conduct the searching review of evidence arguably

⁴⁵ See, e.g., Amar, *supra* note 5, at 1189-91.

⁴⁶ See *Johnson v. Louisiana*, 406 U.S. 356, 371 (1972) (Powell, J., concurring) ("At the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law."); see also Amar, *supra* note 5, at 1189 ("Founding history is relatively clear. A criminal jury had to be unanimous.").

⁴⁷ See, e.g., *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891); 1 Edward J. Devitt, et al., *Federal Jury Practice and Instructions: Civil and Criminal* § 15.01 (4th ed. 1992) ("You, as jurors, are the sole and exclusive judges of the credibility of each of the witnesses called to testify in this case and only you determine the importance or the weight that their testimony deserves.").

⁴⁸ *In re Winship*, 397 U.S. 358, 364 (1970).

⁴⁹ *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). *Jackson* limited juries' discretion by requiring reviewing courts to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. The previous standard effectively insulated guilty jury verdicts by positing that only those convictions supported by "no evidence" violated due process. *Thompson v. Louisville*, 362 U.S. 199, 199 (1960).

required by the “reasonable doubt” standard. He urged special appellate scrutiny in cases dependent on eyewitness or accomplice testimony and in cases “where the penalty is severe.”⁵⁰

It is not only judges who have misgivings about the capabilities of juries. Another sign of the present discomfort with the criminal jury’s fact-finding dominance is the growing use of expert witnesses (by both prosecution and defense) in criminal trials. Professor George Fletcher argues that expert testimony, especially if based on psychological theories, “threatens the autonomy of common-sense judgments [by the jury] about such questions as whether individuals acted with malice.”⁵¹ Professor Langbein of Yale has argued that the marked dominance of plea-bargaining over trials reflects a rejection of the jury trial as it is now structured.⁵² Finally, the state and federal sentencing guideline systems implemented in the last decade completely bypass the jury (and the “reasonable doubt” standard) in determining the presence or absence of factual elements that sentencing commissions deem to be critical in determining degree of culpability.⁵³ Underlying all of these developments, I suggest, is the simple fact that significant jury discretion—over the facts or over the law—is difficult to square with demands for rationality, equal justice, and public accountability.

Finally, it is clear that today we as a society place a higher value on freedom of expression and public access than we do on confidentiality and secrecy. Outside the courts, our commitment to openness has led to the Freedom of Information Act,⁵⁴ to open meeting laws,⁵⁵ and to regu-

⁵⁰ See Jon O. Newman, *Beyond “Reasonable Doubt,”* 68 N.Y.U. L. Rev. 979, 999-1000 (1993).

⁵¹ See Fletcher, *supra* note 4, at 230.

⁵² See Langbein, *supra* note 5, at 34.

⁵³ See *McMillan v. Pennsylvania*, 477 U.S. 79, 91-93 (1986) (holding, in the pre-guidelines regime, that a preponderance of the evidence standard at sentencing is sufficient); *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 182 (2d Cir. 1990) (holding that the *McMillan* preponderance of the evidence standard continues to apply under mandatory sentencing guidelines), cert. denied, 498 U.S. 844 (1990).

⁵⁴ 5 U.S.C. § 552 (1994).

⁵⁵ See Government in the Sunshine Act, 5 U.S.C. § 552b (1994).

lation of lobbying and executive-legislative contacts.⁵⁶ In the civil justice system, it has led to demands (increasingly sanctioned by judges) that settlements in civil suits be unsealed and even that discovery materials routinely be made public.⁵⁷

It seems that the criminal justice system is not far behind. The battle of the 1960s and 1970s between "free press" and "fair trial" is over. Free press won. Trials and hearings have been opened to press and television coverage. In fact, they are on live television, and no astute observer doubts that this has affected behaviors of courtroom participants.⁵⁸ The venerable rule against jurors impeaching their own verdict is breaking down slowly but surely.⁵⁹ The Third Circuit did not even make the front pages when it recently ruled that the District Court in the *Crazy Eddie* case had erred in restricting juror access to the press after trial.⁶⁰

⁵⁶ See Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270 (1994); see also L. Gordon Crovitz, Rule of 'Met w/ Keating's S & L Senators. Again. End of Log.,' Wall St. J., Jan. 24, 1990, at A15 (discussing proposed executive order that would require executive branch officials to keep log of significant contacts with members of Congress and their staffs).

⁵⁷ In March 1995, the Judicial Conference of the United States (the governing body of the federal courts) rejected a proposal to codify the usual practice of sealing records in settled civil suits on stipulation of the parties. Linda Greenhouse, Judicial Conference Rejects More Secrecy in Civil Court, N.Y. Times, Mar. 15, 1995, at B9. See generally Linda Greenhouse, Judicial Panel Seeks to Ease Sealing of Civil Suit Records, N.Y. Times, Mar. 10, 1995, at A1 (discussing the proposal rejected the following week).

⁵⁸ See, e.g., Susan Estrich, Playing to the Cameras, N.Y. Times, June 3, 1995, § 1, at 19 (noting that television has affected the conduct of both the judge and the lawyers in the O.J. Simpson case). Media attention heightens the visibility of the judge's exercise of discretion, and this may further discourage judges from wielding their critical judicial authority to restrict the scope of evidence and argument in a criminal case. See Stith, *supra* note 3, at 38. The lawyer who loses a ruling in a high profile case is likely to denounce it in the courtroom and (unless the judge has restricted media displays by counsel) to denounce it again in TV interviews on the courthouse steps.

⁵⁹ Post-trial hearings on alleged juror misconduct or other matters affecting the rationality of the verdict are an increasingly common phenomenon in trial courts. See, e.g., *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989). But by a closely divided vote, the Supreme Court has held to the traditional rule. *Tanner v. United States*, 483 U.S. 107 (1987) (5-4 decision concluding that allegations that some jurors were drunk or stoned during the trial did not require hearing).

⁶⁰ The "Crazy Eddie" case provides an interesting exchange between a trial and appellate court over the issue of juror secrecy. *United States v. Antar*, 839 F. Supp. 293 (D.N.J. 1993), modified, 38 F.3d 1348 (3d Cir. 1994).

As my colleague Professor Abraham S. Goldstein has recently written, there is no doubt that the growing frequency of juror interviews in the press and on television has undermined the tradition of confidential and unreviewable jury deliberation.⁶¹ It is hard to believe that this will not affect jury verdicts. But, once again, the *Zeitgeist*—the spirit of the age—is that greater media freedom, more inquiry, and more review are always to the good. I am less certain that the jury system can function well as an institution so directly accountable to public opinion.

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The criminal jury has survived and even flourished over the centuries in part because it has been able to accommodate periodic alteration in its structure and powers. Yet no institution is invincible, and we should be cautious in adopting modifications that alter or remove features of the jury once thought to be fundamental. Further limits on the jury's nullification and fact-finding powers, abolition of peremptories and of the unanimity requirement, and opening up jury deliberations to greater press, public, and appellate scrutiny are some of the "reforms" that may be urged upon us in the coming years in response to irrepressible demands for greater equality, rationality, and accountability. After due consideration, we may conclude that some of these changes are warranted. Nonetheless, we would do well to consider the possibility that, at its core, the jury is an institution that will never harmonize well with certain values that are preeminent in the modern age. The jury's greatest contribution may be precisely that it tempers those values with the competing values of intuition, common-sense, lay judgment, anonymity, and secrecy. The result of any hasty redesign of the criminal jury system could simply be more hung juries, more jury verdicts reversed on appeal due to "errors" in deliberation, and more jurors influenced, if not intimidated, by public opinion. The last is my greatest fear: That in the cases that most demand courage, the insistence on public accountability will mean more juries responding not to the jurors' consciences, but to the mob.

⁶¹ Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. Ill. L. Rev. 295 (1993).

